

SERVICE DATE - LATE RELEASE OCTOBER 31, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-308 (Sub-No. 3X)

CENTRAL MICHIGAN RAILWAY COMPANY—  
ABANDONMENT EXEMPTION—IN SAGINAW COUNTY, MI

Decided: October 31, 2003

By petition filed on July 16, 2003, the Central Michigan Railway Company (CMR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 1.77 miles of railroad, extending from milepost 2.83 at the western end of CMR's railroad bridge over Interstate Highway 75 to milepost 4.60, in Saginaw County, MI.<sup>1</sup> Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (68 FR 46263) on August 5, 2003, instituting an exemption proceeding. On August 20, 2003, Plastatech Engineering Ltd. (Plastatech), the only shipper currently served on the line, filed a reply opposing the abandonment.<sup>2</sup> The Board will grant the exemption, subject to standard employee protective conditions and, due to the unique circumstances of this case, conditions requiring that CMR: (1) provide alternative transload service to Plastatech as offered by CMR on the record in this proceeding; and (2) compensate Plastatech in the amount of \$100,710 (less salvage value) for the shipper's recent investment in facilities to receive direct rail shipments from CMR. On its own motion, the Board also will grant an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905.

PRELIMINARY MATTER

On August 20, 2003, CMR filed a motion for a limited protective order to prevent public disclosure of two letters that it submitted as Exhibit A to the motion. One letter was from CMR's counsel to the Board's secretary, and the other letter was from Plastatech's counsel to CMR's counsel.

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<sup>1</sup> CMR indicates that the above-described mileposts are sometimes referred to by their former designations as milepost 17.21 and milepost 15.46, totaling approximately 1.75 miles of rail line and differing from the current designations by .02-mile. CMR points out that this discrepancy is just a measurement error in the milepost labeling, a fairly common occurrence in railroad milepost designations.

<sup>2</sup> CMR indicated that it had served a copy of its petition on Plastatech.

On September 16, 2003, Plastatech replied that it did not object to the issuance of a protective order covering the materials submitted in Exhibit A to CMR's motion.

The motion will be granted. The material submitted in Exhibit A to CMR's motion will be kept under seal by the Board and will not be placed in the public docket or otherwise disclosed to the public unless otherwise ordered by the Board.

## BACKGROUND

The petition indicates that the proposed abandonment will enable the Michigan Department of Transportation (MDOT) to go forward with plans to widen Interstate Highway 75. CMR alleges that its bridge over Interstate Highway 75 has abutments that are an obstacle to widening the highway. CMR and MDOT have agreed that, if the Board authorizes abandonment of the line, MDOT may remove the bridge. MDOT agreed to pay CMR more than \$3 million for a release from the carrier for the bridge property and from all damages and future claims resulting from the bridge removal.

CMR claims that operations on the 1.77-mile line are unprofitable, that traffic levels and revenues do not justify continued operation and maintenance, and that the line needs rehabilitation to remain in service. A verified statement by CMR's president, Charles A. Pinkerton III, indicates that the line currently serves Plastatech, a manufacturer of vinyl roofing laminates. According to Mr. Pinkerton, Plastatech received 57 carloads of PVC resin in 2001 and 81 carloads in 2002, generating revenues for CMR of \$25,500 in 2001 and \$41,000 in 2002. Mr. Pinkerton states that in 2002 CMR's cost per carload was \$639.77, but revenues per carload were only \$513.00, resulting in a loss of \$126.77 per carload. There are no other shippers on the line.

According to Mr. Pinkerton, the line is in poor condition and needs substantial capital investment. CMR estimates that it would cost \$16,316 annually to maintain the line within Federal Railroad Administration (FRA) requirements. CMR's annual maintenance estimate consists of \$12,800 for annual tie replacement, \$516 for inspections, and \$3,000 for miscellaneous expenses including replacing bolts, changing broken joint bars and gauging. Mr. Pinkerton states further that, if the line remained in service, CMR would be required to spend more than \$5 million to rebuild the bridge over the widened highway.

Mr. Pinkerton asserts that Plastatech had been using trucks for transportation service. Prior to 2001, Plastatech had allegedly received PVC resin by truck, with much of it moving in transload service at Willis, MI, originating on another rail carrier. Mr. Pinkerton states that CMR will offer a transloading service to Plastatech for PVC resins on its railroad with truck delivery to Plastatech's plant. CMR states that it offered to continue storing shipper cars containing PVC resins on its line, without car hire charges, so that Plastatech could continue to order PVC in carload volumes and will

offer Plastatech a rate reduction in conjunction with the transload operation. CMR argues that Plastatech may apply the cost savings from the offered rate reduction to offset costs of the trucking portion of the transload operation.

In its reply, Plastatech states that it has invested \$100,710 between 1996 and 1998 to install rail trackage and unloading facilities, so it could receive PVC resin directly by rail. The shipper indicates that it currently is receiving nearly all of its PVC resin directly by rail, that its use of the line has increased and that it is planning to receive other products by rail. The shipper disputes that it is using truck transportation, asserting that much of its production is used by its affiliate, Duro-Last, to manufacture finished roofing products that are shipped by truck from the plant. Plastatech asserts that it would incur substantially higher transportation costs if it received PVC resin by truck, and that the transloading service that CMR has offered to provide would require it to incur additional costs of \$143,920 per year.

Plastatech contends that the record is not adequate to support granting an exemption to permit CMR to abandon the line. The shipper asserts that CMR has not submitted any evidence to support Mr. Pinkerton's testimony about CMR's average costs for operating the line. According to Plastatech, CMR has not identified additional operating costs for locomotives, freight cars and train crews. It asserts further that CMR's maintenance cost estimates are unsupported and excessive. Plastatech contends that CMR's estimate for tie replacement exceeds minimum FRA Class 1 standards. The shipper estimates that CMR's maintenance costs should amount to \$6,688 per year, consisting of \$3,172 for tie replacement, \$516 for inspections and \$3000 for miscellaneous expenses. It notes that CMR has not specified the condition of the line under FRA standards and the extent of required annual crosstie replacement to keep the line in that condition.<sup>3</sup>

Plastatech disputes CMR's claim that the railroad would be obligated to spend more than \$5 million to rebuild the bridge if the line continued in service, suggesting that MDOT would incur that cost, not CMR. Finally, the shipper indicated that the payment from MDOT should provide ample funding for CMR to arrange continued rail service at another location.

Noting CMR's offer to provide transloading service to compensate Plastatech for the loss of rail service, the Board, in a decision served on September 25, 2003, directed the parties to undertake negotiations to attempt to reach an agreement in this proceeding and advise the Board of the results of

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<sup>3</sup> On August 27, 2003, CMR filed a motion to strike, contending that there was no verification by any individual who had knowledge of facts alleged in Plastatech's reply. Plastatech responded that the Board's rules do not require that the reply be verified. The motion will be denied. Exemption proceedings are informal, and verified statements are not required. See 49 CFR 1121.4.

the negotiations by October 16, 2003. The parties reported on that date that they were unable to reach an agreement.

The reports indicate that CMR has offered, and continues to offer, to: (1) provide a \$200 per car rebate on future rail freight charges for Plastatech shipments transloaded at CMR's facility in Saginaw, MI; (2) continue open ended holding of loaded private cars consigned to Plastatech without added charge; and (3) make a cash payment to Plastatech sufficient to cover the book value (less salvage value) of the rail facilities in which Plastatech invested to switch from truck to direct rail service for receiving PVC resin. Plastatech, however, has rejected CMR's settlement offer as inadequate, contending that it should receive a substantial portion of the proceeds that CMR would receive from MDOT as compensation for the probable increased shipping costs it allegedly would incur as a result of the abandonment. Specifically, Plastatech indicates that it should receive compensation in the amount of \$1,049,922, consisting of: (1) \$922,135, representing the net present value of its estimated increased transportation costs, with certain adjustments; and (2) \$57,787, representing the undepreciated value of its rail improvements. Plastatech concludes that CMR has failed to justify the proposed abandonment under traditional decisional criteria, and that CMR's exemption petition should be denied, leaving CMR with the option of filing a formal abandonment application.<sup>4</sup>

CMR asserts that Plastatech is not legally entitled to receive any funds from MDOT. CMR states further that Plastatech has already recouped its investment in its rail facilities through the substantial savings it achieved by using direct rail service rather than truck. CMR indicates further that the transload option it has offered to Plastatech would enable that shipper to continue receiving significant savings in transportation costs.

## DISCUSSION AND CONCLUSIONS

Exemption criteria. Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without prior Board approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from an abuse of market power.

In determining whether an exemption is in the public interest, the Board must weigh the competing interests and burdens presented here. In particular, the record shows that an exemption will

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<sup>4</sup> Plastatech contends that determining whether to condition the abandonment to require compensation for Plastatech's loss of rail service is a complex question that can be adequately resolved only through a formal application.

enable MDOT to go forward with its plans in a timely manner to remove the bridge and ultimately widen Interstate Highway 75.<sup>5</sup> This major highway improvement plan is in the public interest and appears to be the primary reason for the proposed abandonment, and it has led to the contract between MDOT and CMR that would compensate CMR in the amount of \$3,046,500 for the loss of its bridge. Thus, the Board will give due consideration to this highway project in reaching a decision in this unique case.

While CMR claims that the line is unprofitable, the operating cost data the carrier submitted are not adequately supported to confirm this assertion. As previously noted, CMR has estimated its average cost per carload to be \$639.77 but has failed to show how it arrived at that figure. Also, CMR's maintenance cost estimate appears to be inflated, as CMR has used a tie replacement rate of 200 per mile, which significantly exceeds the FRA Class 1 standard of 28 ties per mile.<sup>6</sup>

The record here does, however, contain evidence of substantial opportunity costs to the railroad should the abandonment proposal be denied. Opportunity costs are defined as the real economic loss an entity experiences when it must forgo some other, more profitable use of its resources.<sup>7</sup> While opportunity costs are typically derived from valuing the track and other assets, here they arise because the State has an alternative transportation-related use for the property that serves important public purposes. Thus, under the circumstances here, we find that CMR would incur a substantial opportunity cost if it had to forgo receiving the \$3,046,500 payment from MDOT to compensate it for the loss of its bridge over Interstate Highway 75.<sup>8</sup> CMR's opportunity cost,

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<sup>5</sup> Abandonment would also avoid any financial obligation to rebuild the bridge if the line were to remain in service, no matter who would incur that obligation.

<sup>6</sup> Based on the Board's records, the historical average maintenance cost estimate for a line of this length would be \$8,850, about half of the amount that CMR has projected.

<sup>7</sup> Abandonment of R. Lines—Use of Opportunity Costs, 360 I.C.C. 571, 577 (1980), aff'd sub nom. Farmland Indus., Inc. v. United States, 642 F.2d 208 (7th Cir. 1981).

<sup>8</sup> Agency precedent provides that a contract for the purchase of rail assets negotiated at arm's length, as here, constitutes strong evidence of the value of those assets. See 1411 Corporation—Abandonment Exemption—In Lancaster County, PA, STB Docket No. AB-581X, et al. (STB served Oct. 18, 2001), slip op. at 4, aff'd sub nom. Borough of Columbia v. STB, 342 F.3d 222 (3d Cir. 2003); Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, STB Docket No. 556 (Sub-No. 2X) et al. (STB served Oct. 4, 2000), slip op. at 16; Portland Traction Company—Abandonment Exemption—In Multnomah and Clackamas Counties, OR,

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therefore, is properly calculated here on the basis of the amount to be paid to CMR under the confirmed agreement, applying a factor of 14% representing the 2002 pre-tax cost of capital.<sup>9</sup> This results in an annual opportunity cost to the railroad of \$426,510, the cost to it of forgoing MDOT's payment for the bridge. This greatly exceeds CMR's annual revenues of \$41,000, or any revenues that can reasonably be expected to be generated on the line. Moreover, CMR necessarily incurs some level of costs from operations and maintenance. Under these circumstances, the line is a burden on interstate commerce.

Thus, although CMR did not make a strong showing of operating and maintenance costs, its abandonment proposal is clearly justified by the opportunity costs associated with the bridge project. And while Plastatech will be adversely affected by the loss of direct rail service, it is well settled that a railroad will not be required to operate a rail line simply to prevent shippers from incurring higher transportation costs by truck. See CSX Transportation, Inc.-Abandonment Exemption-In Harrison County, WV, STB Docket No. AB-55 (Sub-No. 563X) (STB served Sept. 25, 1998). Nevertheless, the transload service offered by CMR under the terms set out in its October 16, 2003 report would mitigate Plastatech's increased costs, and CMR has not withdrawn that offer. Under the unusual circumstances here – the line's unprofitability was not clearly shown, the substantial opportunity cost arose solely because of the highway project, and the shipper had no basis for thinking that its investment would be lost shortly after it was made – the grant of the sought exemption will be subject to the requirement that CMR hold to its offer to provide transload service under the terms proposed by CMR in its October 16, 2003 report.

Indeed, the circumstances in this unusual case warrant additional relief for Plastatech. As noted, CMR's abandonment proposal differs from other abandonments. The driving force for the abandonment is the road construction project. Plastatech has made a good faith investment of \$100,710 to construct facilities to receive direct rail service. It is highly unlikely that Plastatech would have made that investment had it known that CMR shortly would attempt to abandon the line. Particularly given the State's offer to CMR, Plastatech appears to be justified in claiming that it should receive compensation for its recent investment in its rail facilities.<sup>10</sup> Accordingly, a condition will be

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<sup>8</sup>(...continued)

Docket No. AB-225 (Sub-No. 2X) (ICC served Jan. 19, 1990), slip op. at 5.

<sup>9</sup> See Railroad Cost of Capital-2002, Ex Parte No. 558 (Sub-No. 6) (STB served June 11, 2003).

<sup>10</sup> CMR, in its October 16, 2003 report, has already offered to make a cash payment to Plastatech to cover the book value (less salvage value) of the rail facilities in which Plastatech invested  
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imposed requiring that CMR pay Plastatech the amount of \$100,710 (the shipper's recent investment in facilities to receive direct rail shipments from CMR) (less the salvage value), because it is equitable for CMR to share in the burden placed on Plastatech in these unique circumstances where neither CMR nor Plastatech could anticipate that MDOT's important transportation needs would necessitate abandonment of this line.

Plastatech's request for a formal proceeding is unpersuasive. Such a proceeding would serve merely to delay this important highway project with little prospect of providing any information that would change the result reached in this decision.

Given the importance of the highway project, the railroad's opportunity cost in forgoing the abandonment, and the mitigation for the lone shipper discussed above, the various factors in this unusual case weigh in favor of granting the exemption, consistent with the statutory criteria at section 10502(a). In particular, the public interest favors removing the bridge to enable MDOT to go forward with plans to widen Interstate Highway 75.

Under these circumstances, the Board finds that detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioner of the costs of owning, maintaining, and operating the line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Because Plastatech will likely continue to have access to rail service through favorable transloading and will be compensated for its recent investment in rail facilities, the Board finds that regulation is not necessary to protect shippers from an abuse of market power.<sup>11</sup> Given the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Employee protection. Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed as a condition to granting this exemption.

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<sup>10</sup>(...continued)  
to switch from truck to rail for its receipt of resin.

<sup>11</sup> Plastatech, an active participant in this proceeding, is the only shipper on the line.

Environmental issues. CMR has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on September 12, 2003.

The EA indicated that the Michigan Historic Center had not as yet completed its review of the proposed abandonment. As a result, SEA recommended that a condition be imposed on any decision granting abandonment authority that CMR shall retain its interest in and take no steps to alter the historic integrity of the line and all sites and structures on the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. Subsequently, the Michigan Historical Center, Department of History, Art and Libraries (SHPO), advised SEA by letter dated August 25, 2003, that no historic properties would be affected by the proposed abandonment.

Other than the remarks from the SHPO, no comments on SEA's recommendations were filed by the due date. Based on the SHPO's comments that the proposed abandonment would not affect historic properties, SEA now recommends that the condition it previously recommended need not be imposed. Based on SEA's recommendation, the Board finds that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Expedited action request and exemption from 49 U.S.C. 10904-05. On September 9, 2003, CMR filed a Motion for Expedited Decision requesting that the Board issue a decision by October 31, 2003. CMR states that MDOT has accepted a bid to remove the bridge, requiring that the bridge be removed prior to the end of 2003. CMR indicates that, if the bridge is not removed by that time, MDOT would have to obtain new budget authority for the project, requiring new bids that would substantially delay the project.

Plastatech filed a reply on September 25, 2003, urging the Board to deny CMR's motion. Plastatech asserts that CMR was asked by MDOT to take steps to abandon its line on February 4, 2003, but CMR allegedly delayed commencing the abandonment process for several months. In its report submitted on October 16, 2003, Plastatech contends that it has been advised that MDOT has no current plan to remove the railroad bridge or to widen Interstate Highway 75.

In its report submitted on October 16, 2003, CMR submits copies of MDOT plans showing that removal of the bridge is scheduled to be completed in 2003. According to CMR, MDOT wants to remove the bridge promptly for safety reasons to expand and widen the roadway, including the on/off



ramps for State Highway 46 and Interstate Highway 675. The bridge removal is described as a significant first step to a long-term project to widen Interstate Highway 75.

The evidence submitted by CMR confirms that MDOT intends to go forward with demolishing the bridge by the end of 2003. Under these circumstances, CMR's request for expedited handling is appropriate and will be granted. To accommodate that request, the exemption will be made effective in 20 days, rather than the customary 30 days.

Exemptions from 49 U.S.C. 10904 and 10905 have been granted when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.<sup>12</sup> The need to remove the rail bridge to allow MDOT's major highway improvement plan to go forward clearly constitutes a valid public purpose, obviating the need for a public use condition. Allowing for an OFA process could significantly delay or even thwart the timely completion of the planned construction projects – the driving force behind this proceeding. And the lone shipper on the line will have a transportation alternative pursuant to the condition imposed here requiring CMR to provide favorable transloading service per its offer to do so. Given all the circumstances of this unique case, including the relief being ordered for the shipper, the Board finds that there is no overriding public need for continued rail service here over the line proposed for abandonment. It would be inconsistent with that finding to allow anyone to invoke the OFA provisions of section 10904, or the public use provisions of section 10905, to preserve that service.

The evidence of record establishes that exemptions from 49 U.S.C. 10904 and 10905 meet the criteria of 49 U.S.C. 10502. Applying OFA or public use requirements in this instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Application of these provisions (sections 10904 and 10905) is not necessary to protect shippers from an abuse of market power, given the relief being imposed for the lone shipper on the line.

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<sup>12</sup> See, e.g., Central Kansas Railway, L.L.C.–Abandonment Exemption–In Sedgwick County, KS, STB Docket No. AB-406 (Sub-No. 14X) (STB served Apr. 10, 2001); Norfolk and Western Railway Company–Abandonment Exemption–In Cincinnati, Hamilton County, OH, STB Docket No. AB-290 (Sub-No. 184X) (STB served May 13, 1998).

It is ordered:

1. The material submitted in Exhibit A to CMR's motion will be kept under seal by the Board and will not be placed in the public docket or otherwise disclosed to the public unless otherwise ordered by the Board.

2. CMR's motion to strike is denied.

3 Under 49 U.S.C. 10502, the Board exempts from the requirements of 49 U.S.C. 10903 through 10905 the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that CMR: (1) establish a transload operation to handle Plastatech's shipments under the terms CMR proposed in its October 16, 2003 report; and (2) compensate Plastatech in the amount of \$100,710 (less salvage value) for the shipper's recent investment in facilities to receive direct rail service from CMR.

4. This exemption will be effective on November 20, 2003. Petitions to stay must be filed by November 12, 2003, and petitions to reopen must be filed by November 25, 2003.

5. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CMR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CMR's filing of a notice of consummation by October 31, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary